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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 605

J. C. ANDEREGG,

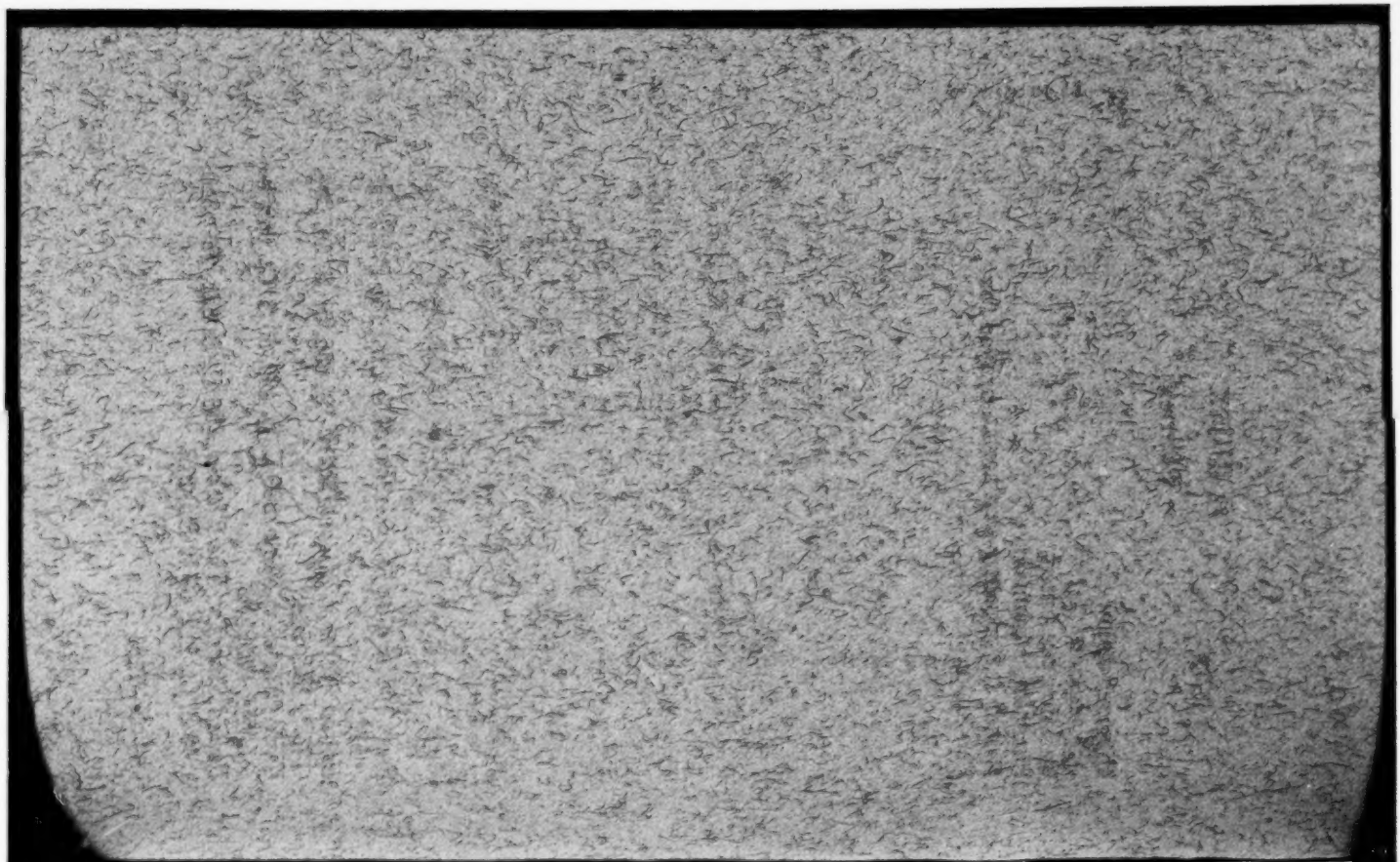
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF.

W. N. HANNAH,
ROBERT LEWIS YOUNG,
Attorneys for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 605

J. C. ANDEREGG,

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vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, J. C. Anderegg, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, rendered on November 30, 1948, affirming a judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, of August 7, 1948, dismissing the petitioner's Complaint.

Opinions Below

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit (hereinafter called the

Court of Appeals) appears at page 8 of the record and is reported *sub nom. J. C. Anderegg* v. *United States,* 171 F. 2d 127. The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division (hereinafter called the District Court), was not officially reported, but also will be found in the record at page 5.

Jurisdiction

Jurisdiction is invoked under Section 1254(1) of the Judicial Code, being Chapter 646 of Public Law 773 of the Eightieth Congress, Second Session, enacted June 25, 1948, which took effect September 1, 1948. The opinion of the Court of Appeals was filed November 30, 1948.

Question Presented

The single question the review of which is sought by this petition is whether the United States can be estopped to rely upon Section 2401 (b) of the Judicial Code (formerly 28 U. S. C., sec. 942), relating to the limitation of actions under Section 1346 (b) of the Judicial Code (originally known comprehensively as the Federal Tort Claims Act of August 2, 1946 (60 Stat. 842)), by the acts and omissions of its officers and agents.

Summary Statement

Since petitioner's Complaint in the District Court under the Federal Tort Claims Act was dismissed on motion asserting that his claim was barred by lapse of time, the facts may be summarized from the Complaint as follows:

On or about January 2, 1945, in Goochland County, Virginia, certain soldiers in the military service of the United States, acting within the scope of their employment, entered an unoccupied dwelling house of the petitioner, and built a fire therein, which, through their negligence, ignited the

house. The house and certain personal property therein were wholly consumed in the fire.

On or about January 6, 1945, the petitioner gave notice of his claim against the United States to the proper military authorities at Camp Pickett, Virginia, and, pursuant to instructions, accomplished War Department Form No. 41 stating his claim. Subsequent to that date and from time to time he followed all directions and suggestions of the United States with reference to the proper prosecution of his claim through various military channels and echelons of command, having been at all times led to believe that the proper method of making his claim was by administrative procedure through Army channels under Army Regulation 25-20. On November 19, 1947, he was notified for the first time by communication of C. O. Wolfe, Colonel, J. A. G. D., Chief, Claims and Litigation Division, The Judge Advocate General's Office, that his claim could not be settled administratively by the Department of the Army in view of the provisions of the Federal Tort Claims Act.

The present action for the damages mentioned was instituted on April 14, 1948, admittedly too late, if, under the facts set out, the United States be entitled to rely upon the limitation provision of the Federal Tort Claims Act. The District Court was of the opinion that the case was governed by a principle to the effect that "the rights of the Government cannot be waived or prejudiced by the acts or omissions of its officers and employees" (R. p. 4). The Court of Appeals, affirming the action of the District Court in dismissing the Complaint, stated that ". . . it is elementary that the government may not be sued except in strict accord with the conditions which it has imposed and that neither action nor neglect on the part of governmental officers may extend the time for suit which Congress has limited" (R. p. 8).

Reason for Granting Writ Herein Prayed For

The Court of Appeals, it is believed, has decided an important question of federal law which has not been, but should be, settled by this Court, by improperly applying the principle that, where Congress has waived the immunity of the United States to suit for a limited time only, no act or neglect of its officers and agents may extend that time to an action against the United States instituted under a law containing, not only a general waiver of immunity and an ordinary limitation provision, but an express provision to the effect that it shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Conclusion

WHEREFORE, for the reasons stated in the petition and the annexed brief, it is respectfully submitted that the writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit herein prayed for should be granted.

W. N. HANNAH,
Palmyra, Virginia,
ROBERT LEWIS YOUNG,
Richmond, Virginia,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 605

J. C. ANDEREGG,

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THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The decision of the Court of Appeals in this case appears to have been prompted, at least in part, by the belief that the substantive cause of action herein sued upon was created by the Tort Claims Act, citing in this connection its footnote No. 2 to its opinion in *State of Maryland* v. *Burkhardt,* 4 Cir., 165 F. 2d 869, 873. Obviously this conclusion was an erroneous one. The Act is invoked by persons having tort claims against the United States only because it waives immunity to suit, which is nothing more than a procedural impediment to redress by judicial process. The

claim here exists by virtue of the common law of Virginia and a claim against the United States is "not the less legal or equitable" on account of immunity. *Emerson* v. *Hall*, 13 Pet. (38 U. S.) 409, 412, 10 L. Ed. 223.

To the same effect is *United States* v. *The Thekla*, 266 U. S. 328, 339, 340, 45 S. Ct. 112, 69 L. Ed. 313, where Mr. Justice Holmes said as follows:

> "The absence of legal liability in a case where but for its sovereignty it (the United States) would be liable, does not destroy the justice of the claim against it."

Both that this is a case of first impression and that the cases cited by the Court of Appeals in support of its opinion to the effect that neither action nor neglect on the part of governmental officers may extend the time for suit under the Federal Tort Claims Act do not support that conclusion, may be demonstrated by a reference to those cases. *U. S.* v. *Michel*, 282 U. S. 656, 51 S. Ct. 284, 75 L. Ed. 598, involved a limitation provision of the Act invoked as authority for suit to the effect that "No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax . . .". In *Munro* v. *U. S.* 303 U. S. 36, 58 S. Ct. 421, 82 L. Ed. 633, this Court was concerned with a limitation provision contained in the Act authorizing suit, phrased as follows: "No suit . . . shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made . . .". In both of these cases, therefore, the applicable limitations provision was expressly designed to be a limitation upon the waiver of immunity to suit, rather than an ordinary limitation. In *Finn* v. *U. S.* 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128, the language of the limitation provision there involved was that

of an ordinary statute of limitation but this Court pointed out that more than ten years had elapsed from the time that the claim first accrued before it was presented to the proper administrative department of the government for settlement.

It is true, as counsel for the respondent contended in the court below, that Acts waiving governmental immunity are to be strictly construed, but this rule is limited in its application to the inquiry as to whether or not the subject-matter of the claim made is within the particular Act invoked. Here, of course, there is no question but what the petitioner's claim is within the Act relied upon. In such case the applicable rule, it is thought, is that when Congress has deliberately used broad statutory language authorizing suit, the usefulness of the statute will not be "thwarted by an unduly restrictive interpretation." *Canadian Aviator, Ltd.*, v *U. S.*, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901, 907. In *U. S.* v. *Shaw*, 309 U. S. 495, 60 S. Ct. 659, 84 L. Ed. 888, 892, Mr. Justice Reed, in delivering the opinion of the Court said:

> ". . . A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. By the act of March 3, 1797, and its successor legislation, as interpreted by this Court, cross-claims are allowed to the amount of the government's claim, where the government voluntarily sues. Specially designated claims against the United States may be sued upon in the Court of Claims or the district courts under the Tucker Act. Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed. As to these matters no controversy exists."

An example of this Court's interpretation of a broad general statutory provision waiving immunity, is to be found in *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724, 730. In that case it was urged that there were strong considerations of policy against giving full and natural effect to the wording of the Act involved, but Mr. Justice Douglas, in that case, said:

> "In our view, however, the bridge was crossed when Congress abrogated the immunity by this 'sue and be sued' clause. And no such grave interference with the federal function has been shown to lead us to imply that Congress did not intend the full consequences of what it said. Hence, considerations of convenience, cost and efficiency which have urged here are for Congress which, as we have said, has full authority to make such restrictions on the 'sue and be sued' clause as seen to it appropriate or necessary."

Section 1346(b) of the Judicial Code, the Act here invoked by the petitioner, provides, insofar as pertinent, as follows:

> ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injuries or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the government while acting in the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Section 2401(b) of the Judicial Code, the limitations provision here under consideration, provides, insofar as pertinent, as follows:

> "A tort claim against the United States shall be forever barred unless action has begun thereon within one year after such claim accrues. . ."

And Section 2674 of the Judicial Code, further defining the liability of the United States, provides in part as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances. . ."

It is the petitioner's contention that as regards tort claims, the government has now placed itself by the clearest language of Congress in exactly the same position that a private person would be, had he, rather than an officer or agent of the government, injured the plaintiff or his property by a wrongful act. No case of this Court is found interpreting the meaning of the language of Congress wherein it is stated that as regards claims of this character the government should be in the same status as though it were a private person. It is assumed, however, that Congress must have had some thought in mind in adding language which was significantly absent in earlier acts authorizing suits against the government on various types of claims. It may be, as argued by counsel for the respondent in the court below, that the revisers of the Judicial Code did not have in mind modifying the rule which had grown up under the Tucker Act and others like it as that rule is announced in the decision of the Court of Appeals in the instant case but, since the language of Congress is plain upon this point, it is difficult to see how any special rules of statutory construction could be resorted to.

If the petitioner be correct in his contention that in a suit of this kind the United States occupies the same position as a private litigant, then it is thought to inescapably follow that it should be estopped to rely upon the applicable statute of limitations as a defense to the petitioner's claim.

In *U. S.* v. *The Thekla, supra,* Mr. Justice Holmes took notice of the principle that when the United States takes

the position of a private suitor it agrees, by implication, that justice may be done with regard to the subject-matter.

In *McKnight* v. *United States,* 8 Otto (98 U. S.) 179, 186, 25 L. Ed. 115, it is said:

> "With few exceptions, growing out of consideration of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter."

In *Brent* v. *Bank of Washington,* 10 Pet. (35 U. S.) 596, 9 L. Ed. 547, a suit in equity in which the United States was the real complainant, it was held that the United States is no more exempted from the fundamental rules of equity than any other suitor. In that case there had been a judgment in favor of Mr. Brent's executors, through whom the United States claimed, upon a plea of the Statute of Limitations in an action brought by the bank, but it was held that in a court of equity the United States was estopped to deny the existence of the bank's claim.

The cause of action here sued upon arose on January 2, 1945. At that time there was but one course of action open to the petitioner, that being to file a claim wih the military authorities, as he did. Under the law then in force (Act of July 3, 1943, c. 189, sec. 1; 57 Stat. 372), published by the War Department as the then current Army Regulation 25-20 and Army Regulation 25-25, claims such as this were processed by the Army and sent to Congress with recommendations. The obvious intent of this legislation was that the Army would relieve Congress of the tremendous labor which would have been incident to the consideration of each claim as a private bill. This legislation was expressly repealed by the Federal Tort Claims Act insofar as it applied to claims of this character (60 Stat. 846, 847, sec. 424(a)), which became effective August 2, 1946.

Army Regulation 25-25, 2 Aug., 1946, gave notice to all military personnel that all claims cognizable under Part 2, Federal Tort Claims Act, could no longer be handled by the Army. For a year and three and one-half months after that time, that is, until November 19, 1947, the petitioner was led to believe that his claim was in the proper channel and being processed to completion. In the meantime, on August 2, 1947, the bar of the limitation contained in the Federal Tort Claims Act fell, unless the Government is estopped to plead it, as is now submitted.

Respectfully submitted,

W. N. HANNAH,
ROBERT LEWIS YOUNG,
Counsel for Petitioners.

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